

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY


BEFORE THE ADMINISTRATOR

In the Matter of)
)
FORMOSA PLASTICS CORPORATION,) NPDES Permit No. TX0085570
)
Permittee,)

CERTIFICATION OF INTERLOCUTORY APPEAL

Pursuant 40 C.F.R. 124.90, the attached order finding that I have no jurisdiction is certified to you. The matter was referred for assignment of an Administrative Law Judge by the Acting Regional Administrator for Region 6, who has determined that the Administrative Law Judge has authority under the applicable rules of practice to preside over a permittee's request for an immediate discharge even though the request for an evidentiary hearing by a party opposing the permit and the immediate discharge has not yet been decided.

The question involved is important to the administration of NPDES permit proceedings, there is substantial ground for a difference of opinion, and an immediate ruling will materially advance the completion of this proceeding insofar as it affects the permittee's right to an immediate discharge.


Gerald Harwood
Senior Administrative Law Judge

Dated: Oct 19, 1993

BEFORE THE ADMINISTRATOR

Interlocutory Order Denying Jurisdiction and Returning Matter to
Acting Regional Administrator

According to the permittee's motion a final permit which is the basis for the request was issued by Region 6 on August 16, 1993. A request for an evidentiary hearing on the granting of the permit and an opposition to the permittee's motion has been filed by Diane Wilson. Pursuant to telephone conferences with the parties on October 18 and 19, 1993, I have been informed that the request for an evidentiary hearing has been opposed by the permittee on the grounds that it is untimely. I have also been informed that the RA has not yet ruled on Ms. Wilson's request for an evidentiary hearing.

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40 C.F.R. 124.81, an Administrative Law Judge is assigned to preside when an evidentiary hearing has been granted. The RA, however, has interpreted the rules as authorizing the Administrative Law Judge to preside over requests for immediate discharges filed pursuant to 40 C.F.R. 124.60(a)(2), until final agency action on the permit, including any appeal to the Environmental Appeals Board under 40 C.F.R. 124.91, on the denial of a request for an evidentiary hearing by the RA.

The RA relies for his interpretation of the rules on 40 C.F.R. 124.81, and on a statement in the preamble to the EPA's amendments to its rules in 1982, 47 Fed. Reg. 25550 (June 14, 1982). A copy of the pertinent language in the preamble is attached as Appendix 2 to this decision.

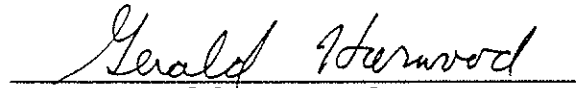
While weight should be given to the RA's interpretation, I believe that the final determination as to my jurisdiction rests with me, subject to appeal to the Environmental Appeals Board. It would obviously not be appropriate to preside in this matter if I had no authority to do so.

The regulation itself, 40 C.F.R. 124.81, clearly applies only to presiding over evidentiary hearings granted by the Regional Administrator. The preamble refers to requests for immediate discharges made by applicants who are also requesting an evidentiary hearing. This language is clearly consistent with the interpretation that Administrative Law Judges are to preside over requests for immediate discharge made during the pendency of an evidentiary hearing and any appeals therefrom. Under 40 C.F.R.

124.60(a)(1), the effective date of the permit is stayed pending final action under 40 C.F.R. 124.91 (governing appeals to the Administrator).

For the reasons stated above, I find that I am without jurisdiction in this matter and the matter is returned to the Acting Regional Administrator.

Counsel for EPA has advised me during our telephone conferences that the EPA disagrees with my position. At the request of and with the concurrence of the parties, I am certifying this order to the Environmental Appeals Board as an appeal from an interlocutory order under 40 C.F.R. 124.90.


Gerald Harwood
Senior Administrative Law Judge

Dated: Oct 19, 1993



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TEXAS 75202-2733

OCT - 4 1993

The Honorable Henry B. Frazier
Chief Judicial Officer
U.S. Environmental Protection Agency
West Tower of Waterside Mall
Room W 1200
401 M Street, S.W.
Washington, D.C. 20460

RE: Formosa Plastics Corporation
NPDES Permit No. TX0085570
Motion to Commence Discharging

1993 OCT - 5 AM 11:36
EPA REGION 6
HEARD

Dear Judge Frazier:

This letter is being sent to request an expedited assignment of an Administrative Law Judge to render a decision on the enclosed Motion to Commence Discharging. The authority for this request can be found at 40 C.F.R. § 124.81 and in the preamble (Federal Register Vol. 47, No. 114, June 14, 1982).

We would appreciate your immediate attention to this matter. If you have any questions, please contact Ms. Robyn Moore, Assistant Regional Counsel at (214) 655-8054.

Sincerely,

W.B. Hathaway
Joe Winkle
Acting Regional Administrator (6A)

Enclosure

APPENDIX 1

Excerpt from:

47 Fed. Reg. 25550 (June 14, 1982)

Under § 124.81, the Regional Administrator is required to request the Chief Administrative Law Judge to assign an Administrative Law Judge to an evidentiary hearing no later than the notice granting the hearing. Assignment of an ALJ may become particularly urgent in cases involving new sources and new dischargers which may wish to file a motion under § 124.60. Applicants who believes they will seek such a motion may, in requesting an evidentiary hearing, also request the Regional Administrator to ask for an expedited assignment of an ALJ with whom the motion may be filed. Regional Administrators should freely grant such requests.

In the Matter of Formosa Plastics Corporation, Respondent
NPDES Permit No. TX-0085570

Certificate of Service

I certify that the foregoing Certification of Interlocutory Appeal and Interlocutory Order Denying Jurisdiction and Returning Matter to Acting Regional Administrator, dated October 19, 1993, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

Attorney for Complainant:

Robyn Moore, Esquire
Assistant Regional Counsel
U.S. EPA
1445 Ross Avenue
Dallas, TX 75202-2733

Attorney for Respondent:

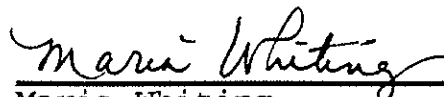
Diane Dutton, Esquire
Kyle Ballard, Esquire
Akin, Gump, Strauss, Hauer
& Feld, L.L.P.
1700 Pacific Avenue
Suite 1400
Dallas, TX 75201-4618

and:

Ms. Diane Wilson
Rte. 1, P.O. Box 453
Seadrift, TX 77983

Fax:

Ms. McKenzie



Maria Whiting
Legal Staff Assistant

Dated: October 19, 1993